

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR  
HOUSE BILL 468

46TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2004

AN ACT

RELATING TO MEDICAID; PROVIDING FOR CIVIL ACTION AGAINST THE  
FILING OF FALSE CLAIMS UNDER THE MEDICAID PROGRAM; PROVIDING  
FOR QUI TAM AWARDS; ENACTING THE MEDICAID FALSE CLAIMS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This may be cited as the  
"Medicaid False Claims Act".

Section 2. PURPOSE.--The purpose of the Medicaid False  
Claims Act is to deter persons from causing or assisting to  
cause the state to pay medicaid claims that are false and to  
provide remedies for obtaining treble damages and civil  
recoveries for the state when money is obtained from the state  
by reason of a false claim.

Section 3. DEFINITIONS.--As used in the Medicaid False  
Claims Act:

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underscored material = new  
[bracketed material] = delete

1           A. "claim" means a written or electronically  
2 submitted request for payment of health care services pursuant  
3 to the medicaid program;

4           B. "department" means the human services  
5 department;

6           C. "medicaid" means the federal-state program  
7 administered by the human services department pursuant to Title  
8 19 or Title 21 of the federal Social Security Act;

9           D. "medicaid recipient" means an individual on  
10 whose behalf a person claims or receives a payment from the  
11 medicaid program, regardless of whether the individual was  
12 eligible for the medicaid program; and

13           E. "qui tam" means an action brought under a  
14 statute that allows a private person to sue for a recovery,  
15 part of which the state will receive.

16           Section 4. FALSE CLAIMS AGAINST THE STATE--LIABILITY FOR  
17 CERTAIN ACTS.--A person commits an unlawful act and shall be  
18 liable to the state for three times the amount of damages that  
19 the state sustains as a result of the act if the person:

20           A. presents, or causes to be presented, to the  
21 state a claim for payment under the medicaid program knowing  
22 that such claim is false or fraudulent;

23           B. presents, or causes to be presented, to the  
24 state a claim for payment under the medicaid program knowing  
25 that the person receiving a medicaid benefit or payment is not

1 authorized or is not eligible for a benefit under the medicaid  
2 program;

3 C. makes, uses or causes to be made or used a  
4 record or statement to obtain a false or fraudulent claim under  
5 the medicaid program paid for or approved by the state knowing  
6 such record or statement is false;

7 D. conspires to defraud the state by getting a  
8 claim allowed or paid under the medicaid program knowing that  
9 such claim is false or fraudulent;

10 E. makes, uses or causes to be made or used a  
11 record or statement to conceal, avoid or decrease an obligation  
12 to pay or transmit money or property to the state, relative to  
13 the medicaid program, knowing that such record or statement is  
14 false;

15 F. knowingly applies for and receives a benefit or  
16 payment on behalf of another person, except pursuant to a  
17 lawful assignment of benefits, under the medicaid program and  
18 converts that benefit or payment to his own personal use;

19 G. knowingly makes a false statement or  
20 misrepresentation of material fact concerning the conditions or  
21 operation of a health care facility in order that the facility  
22 may qualify for certification or recertification required by  
23 the medicaid program; or

24 H. knowingly makes a claim under the medicaid  
25 program for a service or product that was not provided.

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1           Section 5. DOCUMENTARY MATERIAL IN POSSESSION OF STATE  
2 AGENCY.--

3           A. The department shall have access to all  
4 documentary materials of persons and medicaid recipients to  
5 which a state agency has access. Documentary material provided  
6 pursuant to this subsection is provided to allow investigation  
7 of an alleged unlawful act or for use or potential use in an  
8 administrative or judicial proceeding.

9           B. Except for disclosure to any person under  
10 investigation or who is the subject of allegations made  
11 pursuant to the Medicaid False Claim Act or as ordered by a  
12 court for good cause shown, the department shall not produce  
13 for inspection or copying or otherwise disclose the contents of  
14 documentary material obtained pursuant to this section to a  
15 person other than:

- 16                   (1) an authorized employee of the attorney  
17 general;
- 18                   (2) an agency of this state, the United States  
19 or another state;
- 20                   (3) a district attorney, city attorney or  
21 county attorney of this state;
- 22                   (4) the United States attorney general; or  
23                   (5) a state or federal grand jury.

24           Section 6. IMMUNITY.--Notwithstanding any other law, a  
25 person is not civilly or criminally liable for providing access

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[bracketed material] = delete

1 to documentary material pursuant to the Medicaid False Claims  
2 Act to a person identified in Subsection B of Section 5 of that  
3 act.

4 Section 7. CIVIL ACTION FOR FALSE CLAIMS.--

5 A. The department shall diligently investigate  
6 suspected violations. If the department finds that a person  
7 has violated or is violating the provisions of the Medicaid  
8 False Claims Act, the department may bring a civil action  
9 pursuant to Subsection F of this section.

10 B. A private civil action may be brought by an  
11 affected person for a violation of the Medicaid False Claims  
12 Act on behalf of the person bringing suit and for the state.  
13 The action shall be brought in the name of the state. The  
14 action may be dismissed if the court and the department,  
15 pursuant to Subsection F of this section, give written consent  
16 to the dismissal and their reasons for consenting.

17 C. For private civil actions, a copy of the  
18 complaint and written disclosure of substantially all material  
19 evidence and information the person possesses shall be served  
20 on the department. The complaint shall be filed in writing and  
21 shall remain under seal for at least sixty days. The complaint  
22 shall not be served on the defendant until the expiration of  
23 sixty days or any extension approved. Within sixty days after  
24 receiving a copy of the complaint, the department shall conduct  
25 an investigation of the factual allegations and legal

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1 contentions made in the complaint, shall make a written  
2 determination of whether there is substantial evidence that a  
3 violation has occurred and shall provide the person against  
4 which a complaint has been made with a copy of the  
5 determination. If the department determines that there is not  
6 substantial evidence that a violation has occurred, the  
7 complaint shall be dismissed.

8 D. The department may, for good cause shown, move  
9 the court for extensions of time during which the complaint  
10 remains under seal. Any such motion may be supported by  
11 affidavits or other submissions in camera. The defendant shall  
12 not be required to respond to a complaint filed pursuant to  
13 this section until twenty days after the complaint is unsealed  
14 and served to the defendant. The complaint shall be deemed  
15 unsealed at the expiration of the sixty-day period in the  
16 absence of a court-approved extension.

17 E. Before the expiration of the sixty-day period or  
18 any extensions obtained, the department, pursuant to Subsection  
19 F of this section, shall:

20 (1) proceed with the action, in which case the  
21 action shall be conducted by the department; or

22 (2) notify the court and the person who  
23 brought the action that it declines to take over the action, in  
24 which case the person bringing the action shall have the right  
25 to conduct the action if the department determined that there

1 is substantial evidence that a violation of the Medicaid False  
2 Claims Act has occurred.

3 F. The department shall notify the attorney general  
4 prior to filing a civil action pursuant to the Medicaid False  
5 Claims Act and shall not proceed with the action except with  
6 the written approval of the attorney general. The attorney  
7 general shall, within twenty working days from the notification  
8 by the department, notify the department whether it may proceed  
9 with the civil action. Failure by the attorney general to  
10 notify the department of its determination within the specified  
11 time period shall be construed as consent to proceed. The  
12 department shall, after filing the civil action, notify the  
13 attorney general of any proposed dismissal or settlement and  
14 the department shall not proceed with the dismissal or  
15 settlement except with the written approval of the attorney  
16 general.

17 Section 8. RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.--

18 A. If the department proceeds with the action, it  
19 shall have the exclusive responsibility for prosecuting the  
20 action and shall not be bound by an act of the person bringing  
21 the action. The person bringing the action shall have the  
22 right to continue as a nominal party to the action and shall  
23 not have the right to participate in the litigation except as a  
24 witness.

25 B. The department may dismiss the action, pursuant

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1 to Subsection F of Section 7 of the Medicaid False Claims Act,  
2 notwithstanding the objections of the person bringing the  
3 action if the person has been notified by the department of the  
4 filing of the motion and the court has provided the person with  
5 an opportunity for a hearing on the motion.

6 C. The department may settle the action with the  
7 defendant, pursuant to Subsection F of Section 7 of the  
8 Medicaid False Claims Act, notwithstanding the objections of  
9 the person bringing the action if the court determines, after  
10 the hearing, that the proposed settlement is fair, adequate and  
11 reasonable under all the circumstances. Upon a showing of good  
12 cause, such hearing may be held in camera.

13 D. If the state elects not to proceed with the  
14 action, the person bringing the action shall have the right to  
15 conduct the action. If the department requests, it shall be  
16 served with copies of the pleadings filed in the action and  
17 shall be supplied with copies of all deposition transcripts at  
18 the department's expense. When a person proceeds with the  
19 action, the court, without limiting the status and rights of  
20 the person bringing the action, may allow the department to  
21 intervene at a later date upon a showing of good cause.

22 E. Whether or not the department proceeds with the  
23 action, upon a showing by the department that certain actions  
24 of discovery by the person bringing the action would interfere  
25 with the department's investigation or prosecution of a civil

1 matter arising out of the same facts, the court may stay such  
2 discovery for a period not to exceed sixty days. Such a  
3 showing shall be conducted in camera. The court may extend the  
4 sixty-day period upon a further showing in camera that the  
5 department has pursued the civil investigation or proceedings  
6 with reasonable diligence and any proposed discovery in the  
7 civil action will interfere with the ongoing civil  
8 investigation or proceedings.

9 Section 9. AWARD TO QUI TAM PLAINTIFF.--

10 A. If the department proceeds with an action  
11 brought by a person pursuant to the Medicaid False Claims Act,  
12 the person shall, subject to the limitations in this  
13 subsection, receive at least fifteen percent but not more than  
14 twenty-five percent of the proceeds of the action or settlement  
15 of the claim, depending upon the extent to which the person  
16 substantially contributed to the prosecution of the action.  
17 Where the action is one that the court finds to be based  
18 primarily on disclosures of specific information other than  
19 information provided by the party bringing the action relating  
20 to allegations or transactions in a criminal, civil or  
21 administrative hearing or from the news media, the court shall  
22 award a sum as it considers appropriate; provided that the sum  
23 does not exceed ten percent of the proceeds and takes into  
24 account the significance of the information and the role of the  
25 person bringing the action in advancing the case to litigation.

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1 A payment to a person pursuant to this subsection shall be made  
2 from the proceeds. The person shall also receive an amount for  
3 reasonable expenses that the court finds to have been  
4 necessarily incurred, plus reasonable attorney fees and costs.  
5 In determining the amount of reasonable attorney fees and  
6 costs, the court shall consider whether such fees and costs  
7 were necessary to the prosecution of the action, were incurred  
8 for activities that were duplicative of the activities of the  
9 department in prosecuting the case or were repetitious,  
10 irrelevant or for purposes of harassment or caused the  
11 defendant undue burden or unnecessary expense. All such  
12 expenses, fees and costs shall be awarded against the  
13 defendant.

14 B. If the department does not proceed with an  
15 action pursuant to the Medicaid False Claims Act, the person  
16 bringing the action or settling the claim shall receive an  
17 amount that the court decides is reasonable for collecting the  
18 civil recovery and damages recoverable by the state. The  
19 amount shall be not less than twenty-five percent and not more  
20 than thirty percent of the proceeds of the action or settlement  
21 and shall be paid out of such proceeds. The person shall also  
22 receive an amount for reasonable expenses that the court finds  
23 to have been necessarily incurred, plus reasonable attorney  
24 fees and costs. In determining the amount of reasonable  
25 attorney fees and costs, the court shall consider whether such

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1 fees and costs were necessary to the prosecution of the action,  
2 were incurred for activities, which were repetitious,  
3 irrelevant or for purposes of harassment or caused the  
4 defendant undue burden or unnecessary expense. All such  
5 expenses, fees and costs shall be awarded against the  
6 defendant.

7 C. Whether or not the department proceeds with the  
8 action, if the court finds that the action was brought by a  
9 person who planned and initiated the violation upon which the  
10 action was brought, then the court may, to the extent the court  
11 considers appropriate, reduce the share of the proceeds of the  
12 action that the party would otherwise receive pursuant to  
13 Subsection A or B of this section, taking into account the role  
14 of that person in advancing the case to litigation and any  
15 relevant circumstances pertaining to the violation. If the  
16 person bringing the action is convicted of criminal conduct  
17 arising from the person's role in the violation of the Medicaid  
18 False Claims Act, that person shall be dismissed from the civil  
19 action and shall not receive any share of the proceeds of the  
20 action. Such dismissal shall not prejudice the right of the  
21 state to continue the action represented by the department. If  
22 the department does not proceed with the action and the person  
23 bringing the action conducts the action, the court may award to  
24 the defendant its reasonable attorney fees and costs if the  
25 defendant prevails in the action and the court finds that the

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1 claim of the party bringing the action was:

2 (1) filed for an improper purpose;

3 (2) not warranted by existing law or by a  
4 nonfrivolous argument for the extension, modification or  
5 reversal of existing law or the establishment of new law; or

6 (3) was based on allegations or factual  
7 contentions not supported.

8 Section 10. CERTAIN ACTIONS BARRED.--

9 A. A court shall not have jurisdiction of an action  
10 brought pursuant to the Medicaid False Claims Act against a  
11 department official if the action is substantially based on  
12 evidence or information known to the department when the action  
13 was brought.

14 B. A person shall not bring an action pursuant to  
15 the Medicaid False Claims Act that is substantially based upon  
16 allegations or transactions that are the subject of a civil  
17 suit or an administrative proceeding in which the department is  
18 already a party.

19 C. A court shall not have jurisdiction over an  
20 action pursuant to the Medicaid False Claims Act substantially  
21 based upon the public disclosure of allegations or actions in a  
22 criminal, civil or administrative hearing or from the news  
23 media, unless the action is brought by the department or the  
24 person bringing the action is an original source of the  
25 information. For the purposes of this subsection, "original

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1 source" means the person bringing suit that has independent  
2 knowledge, including knowledge based on the person's own  
3 investigation of the defendant's conduct, of the information on  
4 which the allegations are based and has voluntarily provided or  
5 verified the information on which the allegations are based or  
6 has voluntarily provided the information to the department  
7 before filing an action pursuant to this section that is based  
8 on the information.

9 Section 11. DEPARTMENT NOT LIABLE FOR CERTAIN EXPENSES.--

10 The department shall not be liable for expenses that a person  
11 incurs in bringing an action pursuant to the Medicaid False  
12 Claims Act.

13 Section 12. EMPLOYEE PROTECTION.--Any employee who is  
14 discharged, demoted, suspended, threatened, harassed or  
15 otherwise discriminated against in the terms and conditions of  
16 employment by the employer because of lawful acts done by the  
17 employee on behalf of the employee or others in disclosing  
18 information to the department or in furthering a false claims  
19 action pursuant to the Medicaid False Claims Act, including  
20 investigation for, initiation of, testimony for or assistance  
21 in an action filed or to be filed pursuant to that act, shall  
22 be entitled to all relief necessary to make the employee whole.  
23 Such relief shall include reinstatement with the same seniority  
24 status that the employee would have had but for the  
25 discrimination, two times the amount of back pay, interest on

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1 the back pay and compensation for any special damages sustained  
2 as a result of the discrimination, including litigation costs  
3 and reasonable attorney fees. An employee may bring an action  
4 in the appropriate court of the state for the relief provided  
5 in this subsection.

6 Section 13. FALSE CLAIMS AND REPORTING PROCEDURE.--

7 A. A civil action shall be brought within the  
8 limitations set forth in Section 37-1-4 NMSA 1978.

9 B. In any action brought pursuant to the Medicaid  
10 False Claims Act, the department or the person bringing the  
11 action shall be required to prove all essential elements of the  
12 cause of action, including damages, by a preponderance of the  
13 evidence.

14 C. Notwithstanding any other provision of law, a  
15 final judgment rendered in favor of the department in any  
16 criminal proceeding charging fraud or false statements, whether  
17 upon a verdict after trial or upon a plea of guilty, shall  
18 preclude the defendant from denying the essential elements of  
19 the offense in any action that involves the same transaction as  
20 in the criminal proceeding and that is brought pursuant to the  
21 Medicaid False Claims Act.

22 Section 14. APPLICATION OF OTHER LAW.--The application of  
23 a civil remedy pursuant to this law does not preclude the  
24 application of other laws, statutes or regulatory remedy,  
25 except that a person may not be liable for a civil remedy

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1 pursuant to the Medicaid False Claims Act and civil damages or  
2 recovery pursuant to the Medicaid Fraud Act if the civil remedy  
3 and the civil damages or recoveries are assessed for the same  
4 conduct by another government agency.

5 Section 15. USE OF FUNDS.--

6 A. Damages collected pursuant to the Medicaid False  
7 Claims Act on behalf of the state shall be remitted to the  
8 state treasurer for deposit in the general fund to be used for  
9 the state's medicaid program.

10 B. Penalties, legal fees or costs of investigation  
11 recovered pursuant to the Medicaid False Claims Act on behalf  
12 of the state shall be remitted to the state treasurer for  
13 deposit in the general fund to be used for the state's medicaid  
14 program.

15 C. Pursuant to Subsection C of Section 30-44-8 NMSA  
16 1978, penalties recovered pursuant to the Medicaid False Claims  
17 Act on behalf of the state may be claimed by the attorney  
18 general pursuant to procedures established by the department  
19 and the attorney general.